No. 10620

In the United States Circuit Court of Appeals

For the Ninth Circuit

EDWARD SWIDERSKI,

Appellant,

vs.

ALLEN L. MOODENBAUGH,

Appellee.

BRIEF OF APPELLANT

Upon Appeal from the District Court of the United States for the District of Oregon.

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AUTHORITIES CITED

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JURISDICTION

This is an action for personal injuries suffered by plaintiff as the result of an automobile collision that occurred in Milwaukie, Oregon, on July 22, 1941. Appellant, who was the plaintiff in the court below, was and is a citizen of Illinois, and appellee was and is a citizen of the State of Oregon. The amount

sued for was $35,977.92. By agreement of the parties and the pre-trial order of the court, in the event appellant recovered a judgment in excess of $5,000.00, such excess would be remitted by appellant. Verdict was returned for appellee and on July 15, 1942, the District Court of the United States for the District of Oregon entered a judgment for appellee and this is an appeal from that judgment and the verdict upon which it is based.

STATUTORY PROVISIONS

The District Court had jurisdiction of the cause because of the diversity of citizenship of the parties, and the amount in controversy exceeded $3,,000.00. See 28 U.S.C.A. Sec. 41,(1) and (c). The Circuit Court of Appeals has jurisdiction as appellate court. See 28 U.S.C.A. Sec. 225 (a) First.

STATEMENT OF THE CASE

In addition to the foregoing facts the following are pertinent. Appellant charged that appellee was negligent in ten specific respects. (Tr. Page 3) The third specification was that appellee drove his automobile at an excessive rate of speed.

Appellee denied that he was negligent in any particular and charged affirmatively that appellant was negligent in seven particular respects (Tr. Page 6). The fifth specification by appellee was that appellant drove at an excessive rate of speed.

Substantial evidence was adduced by appellant that appellee was driving his automobile in excess of 25 miles per hour and the speed of the respective cars was one of the pertinent issues of fact before the jury. In giving its instructions to the jury the court gave the usual instructions as to the effect if the jury found for or against plaintiff or defendant on any of the issues of negligence or contributory negligence, including the issue of excessive speed.

At the time of the collision the controlling statute on the question of speed was Sec. 115-320 of Oregon Compiled Laws Annotated, see Vol. 8, Annual Pocket Part. This Statute provided that the designated speed at the place of collision was 25 miles per hour.

Appellant had not submitted requested instructions, but an issue of law had been submitted to the court as to the designated speed under Section 115-320 O.C.L.A. The following is the issue as it was set forth in the pre-trial order (see Tr. Page 4).

> With respect to the allegations in subdivision 3, paragraph I supra, it is agreed by the parties that the designated speed at the place of accident was 25 miles per hour. It is the contention of plaintiff that defendant was driving in excess of 25 miles per hour and that under Section 115-320 O.C.L.A. the fact that defendant was driving in excess of 25 miles per hour, if proved, is prima facie evidence of negligence on the part of defendant. It is the position of defendant that he was not violating the basic rule and even if he was driving in excess of 25 miles per hour that would not be prima facie evidence of negligence under the doctrine of Zeek vs. Bicknell, 159 Ore. 167,

which is to the effect that the statutory designated speeds are not relevant in negligence cases and that it is improper to submit to the jury the designated speed.

Upon the conclusion of the court's instructions, the following occurred (see Tr. Page 8):

> "Mr. Lenske: I except to that portion of the instructions relating to speed and ask the court to instruct that the designated speed at the place of the collision, under the Oregon Statute, is twenty-five miles per hour, and that if either of the parties was driving his automobile at a greater speed than twenty-five miles per hour, such fact is prima facie evidence of negligence on the part of such driver; which, however, is not conclusive and can be overcome by other evidence. That is the only exception I have.
>
> "The Court: Exception is granted."

SPECIFICATION OF ERROR I.

The court erred in holding, in effect, for appellee, on the issue of law appearing as Issue No. II of the Pre-trial Order, and which appears on page 4 of the transcript of record: and in substance the court erred in refusing to instruct the jury that the designated speed at the point of collision was twenty-five miles per hour, and that if the jury found from the evidence that appellee was driving in excess of twenty-five miles per hour, such fact was prima facie evidence of negligence on the part of appellee.

POINT A.

Under Chapter 458 of the 1941 Oregon Session Laws and Section 115-320 of the O.C.L.A., as amended, evidence of driving an automobile at a greater rate of speed than the designated speed for the particular area, is prima facie evidence of violation of the basic rule.

POINT B.

Where the speed of a driver is an issue in an action for negligence against such driver and there is substantial evidence that he drove at a speed greater than the designated speed under the Oregon laws, and the issue was raised upon pre-trial as an issue of law, the jury should be instructed as to the designated speed in the area in question, and it should further be instructed that a violation of such designated speed is prima facie evidence of a violation of the basic rule.

POINT C.

Since the Court refused to instruct the jury on the issues as above stated, a reversible error was committed by the Court and appellant should have a new trial.

AUTHORITIES

55-1007 Vol. 3, Oergon Code Annotated, 1930 (Chapter 217, Oregon Laws 1927).

Sylvis vs. Hayes, 138 Ore. 138, 6 P. (2d) 1098.

Section 55-2201 Oregon Code Annotated, Vol. 5, 1935 Supplement (Chapter 360, 1931 Oregon Laws).

Section 115-320 Ore. Compiled Laws Annotated, Vol. 8, Annual Pocket Part (Chapter 360, Oregon Laws of 1941).

Zeek vs. Bicknell, 159 Ore. 167, 78 P. (2d) 620.

Blashfield, Vol. 10, pages 407 and 417.

ARGUMENT

Since the three points boil down to an analysis of the statute involved and the question of what instructions should be given under it, we shall combine our argument on them. The general rule will be found stated as follows in

Blashfield, Vol. 10, Sec. 6704

Page 407:

"Upon a proper case being presented by the pleadings and evidence, an instruction on speed or lack of control as constituting negligence on the part of a motorist, may, and as a *general rule, should be given, even though not requested, since the court, in charging on a subject, must charge all the law thereon material and applicable to the case.*"

Page 417:

> "Where a criminal statute makes a rate of speed in excess of a certain limit prima facie evidence of negligence it is proper for the court to instruct in a civil action that speed in excess of the limit may constitute negligence."

Now let us look at the Oregon statutes and cases. Sylvis vs. Hayes, supra, was based upon an automobile collision that occurred on May 16, 1928 in Portland. At that time Section 55-1007 of Vol. 3, 1930 Oregon Code (Chapter 217 of 1927 Oregon Laws) was in effect. The court, as appears at the bottom of page 421, instructed the jury that the speed limit at the place where the collision occurred was 15 miles per hour if the view was obstructed and

> "you are instructed that the Statutes of this State provide that the operator of an automobile shall not operate the same at a rate of speed in excess of 15 miles per hour . . . .",

The Court also states on Page 426:

> "Section 1 of Chapter 217, General Laws of Oregon, 1927, codified as Oregon Code 1930, Sec. 55-1007, limits the rate of speed of the driver of an automobile to fifteen miles per hour . . . ."
>
> "Based upon this statute and the testimony of record, the trial court was authorized to give defendants' requested instruction set out above. See Goff v. Elde, 132 Or. 698 (288 P. 212)."

Clearly then under the Statute as it existed at that time and as construed by the Oregon Supreme Court, the jury was entitled to know what the speed limit was at the place of collision.

Thereafter, in 1931, 55-1007 of Vol. 3, 1930 Oregon Code Annotated, was repealed and Chapter 360 of the 1931 Oregon Session Laws, which is the same as Section 55-2201, Vol. 5 of the 1935 Oregon Code Annotated Supplement, was substituted. Under this act the so-called basic rule was invoked and in lieu of maximum speed, the so-called indicated speed was applied. Following are the important excerpts from the 1931 law:

> "Basic rule: Application of indicated speeds . . . . (a) Basic rule. No person shall drive a vehicle upon a highway at a speed greater than is reasonable and prudent, having due regard to the traffic, surface and width of the highway and the hazard at intersections and any other conditions then existing."
>
> "Nor shall any person drive at a speed which is greater than will permit the driver to exercise proper control of the vehicle and to decrease or to stop as may be necessary to avoid colliding with any person, vehicle or other conveyance upon (or) entering the highway in compliance with legal requirements and with the duty of drivers and other persons using the highway to exercise due care;"
>
> "Any person convicted of a violation of the above basic rule . . . shall be punished . . ."
>
> "(b) Application of indicated speeds. Any person who drives a vehicle upon a highway at a speed in excess of that indicated as follows . . . shall, upon conviction, be punished . . ."

Following are some of the essential differences appearing in the 1941 act (Vol. 8, Oregon Compiled Laws Annotated, 1941 Pocket Part):

> "Sec. 115-320. Basic rule: Punishment: Desig-

nated speeds: Designation of different speed: . . . . (a) Basic rule . . . ."

Sec. (a) is substantially the same as the same section in the 1931 law but in Sec. (b) we find the following:

> "Any person who drives a vehicle upon a highway at a speed in excess of that *designated* by this act . . . shall, upon conviction, be punished . . .; *provided, that any speed in excess of said designated speeds shall be prima facie evidence of a violation of subsection (a) of this section.*"

It will be seen that under Chapter 360 of the 1931 Oregon Session Laws, the maximum speed limit was removed, the basic rule was adopted and the so-called indicated speed replaced the speed limit.

Then came the decision in Zeek vs. Bicknell wherein it was held that under the law as it then existed no instructions of the indicated speed should be given to the jury. The court, in that case, pointed out that Oregon had adopted the Uniform Act Regulating Traffic on the Highways which was submitted to various states by the National Conference of Commissioners on Uniform State Laws. The court pointed out, however, that Oregon failed to incorporate in its law any provision that driving beyond the indicated speeds constitutes negligence, either per se or prima facie.

The court pointed out that other states had adopted such provisions and these included Colorado, Kansas, North Carolina, Delaware, Idaho, Michigan, Nebraska, New Mexico, North Dakota, South Dakota,

Iowa, Minnesota and Utah. It was because of the failure of the Oregon legislature to incorporate such a provision that instruction to the jury of the indicated speed was not proper. Because of the importance of the reasoning that lead to the decision in Zeek vs. Bicknell, we quote the following from that decision:

> The Uniform Act Regulating Traffic on the Highways (Laws of Oregon for 1931, chapter 360, §§ 55-1901 to 55-2808, inclusive, Oregon Code Supplement 1935) is substantially the same as that submitted to the various states for adoption, by the National Conference of Commissioners on Uniform State Laws, in 1926, and revised by the Conference in 1930. Relative to "indicated speeds" for a particular district or location, it is, aside from the matter of penalties for violation thereof, the same in our traffic act as in the uniform act submitted by the National onference. The statement of the basic rule is also identical. It is noted, however, that the various states, with the exception of Oregon, which have patterned their vehicular traffic acts after the one proposed by the National Conference have departed therefrom in reference to "indicated speeds" by providing in substance that driving in excess of a specified speed constitutes negligence or prima facie evidence of negligence. All the states listed in Vol. 11 of Uniform Laws Annotated (1938) as having adopted the Uniform Act Regulating Traffic on Highways have, with the exception of Oregon, enacted statutory rules concerning speed in certain districts or locations and have made a violation thereof either unlawful or evidence of negligence.
>
> In Arkansas the statutory rule with reference to speed in certain districts or locations is as follows:

"Where no special hazard exists the following speeds shall be lawful but any speed in excess of said limits shall be prima facie evidence that the speed is not reasonable or prudent and that it is unlawful." Pope's Digest, 1937, § 6709 (b).

The same statutory language is used in Colorado (Laws 1935, Art. VI, § 74(b)); Kansas (Laws 1937, ch. 283, § 32(b)); and North Carolina (Public Laws 1937, ch. 407, § 103(b)).

The Delaware statute, Rev. Code 1935, § 5621 (83), provides:

"If the rate of speed of a motor vehicle operated on any highway within the State exceeds * * * such rate of speed shall be deemed prima facie evidence that the person operating such motor vehicle is operating the same in violation of the provisions of this act."

The statutes of Idaho (Code 1932, § 48-504); Michigan (Comp. Laws 1929, § 4697(5)); Nebraska (Laws 1931, ch. 110, § 4(b)); New Mexico (Comp. Stats. 1929, § 11-804(b)); North Dakota (Laws 1927, ch. 162, § 4(b)) and South Dakota (Comp. Laws 1929, § 8636 (4(b)), state the rule as follows:

"Subject to the provisions of subdivision (a) [basic rule] of this section and except in those instances where a lower speed is specified in this act, it shall be prima facie lawful for the driver of a vehicle to drive the same at a speed not exceeding the following, but in any case when such speed would be unsafe it shall not be lawful.

* * * * * *

"It shall be prima facie unlawful for any person to exceed any of the foregoing speed limitations except as provided * * *."

Iowa (Laws 1937, ch. 134, § 316) condenses the rule into the following:

> "The following shall be the lawful speed except as hereinbefore or hereafter modified and any speed in excess thereof shall be unlawful."

Minnesota (Laws 1937, ch. 464, § 28(b)):

> "* * * Any speed in excess of the maximum speed * * * as herein provided shall be prima facie evidence that the speed is not reasonable nor prudent and that it is unlawful."

Utah (Rev. Stat. 1933, § 57-7-16(2)):

> "No person shall drive a vehicle upon a highway at a speed in excess of that indicated below for the particular district or location."

The legislature of this state did not see fit to follow the decided trend of legislation in other states and provide that any person driving in excess of a specified speed should be deemed guilty of negligence or, at least, that such conduct would be prima facie evidence of negligence.

The 1941 Oregon Legislature took cognizance of the reasoning of the Supreme Court in this case and thereupon added the following to the Basic Rule Statute, which comprises the last portion of subsec. (b) of Section 115-320, Oregon Compiled Laws Annotated, Vol. 8, 1941 Annual Pocket Part, to-wit:

> *"provided, that any speed in excess of said designated speeds shall be prima facie evidence of a violation of subsection (a) of this Section."*

It is to be noted that when the act was so amended the words "indicated speed" were no longer used and the act says [subsec. (b)] "said designated speeds

are as follows:"

It is respectfully submitted that the plain and clear intent of the Legislature was expressed in 1941 in the light of the reasoning in the Zeek vs. Bicknell decision so that a speed in excess of the designated speed became prima facie evidence of a violation of the basic rule and therefore the jury was entitled to know what the designated speed was where the collision occurred and plaintiff was entitled to have the jury informed that a speed in excess of the designated speed was prima facie evidence of negligence to be considered along with the remainder of the evidence.

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